Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,
Petitioner

v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,
Respondents

Writ of Certiorari to the
Arizona Court of Appeals, Division One

Brief for Respondents

Paul W. Nercer
P. O. Box 7086
Phoenix, Arizona 85014

Gertrude Doyel
4568 W. El Caminito Dr.
Glendale, Arizona 85301
602-931-3393
Respondents

QUESTION PRESENTED FOR REVIEW

Whether the Constitutional issue raised by judgment debtor/Petitioner has been rendered moot due to the failure of judgment debtor/ Petitioner to perform a condition precedent necessary to bringing his cause of action before the lower Court.

Whether a Sheriff's sale conducted in accordance with the statutory requirements of ARS § 12-1621 A 3 satifies the requirements of the Fourteenth Amendment of the United States Constitution.

Table of Contents

QUESTION PRESENTED FOR REVIEW..... ii

TABLE OF AUTHOPITIES..... iii

STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT..... 2

CONCLUSION..... 5

Table of Authorities

	Page
CASES	
Arnold's Management Corporation et al., v. Eischen, et al., 158 Cal. App. 3r 575 (1984)	3
Mullane v. Central Hanover Bank & Trust Co., 339 U, S, 306	4
Neeley v. Century Finance Co. of Arizona, 606 F. Supp. 1453, (D Ariz. 1985)	4
Young Mines Co. v. Sevringhaus, 38 Ariz. 160, 298 P 628 (1931)	2
STATUTES	
ARS § 12-1621 A 3	i

No. 85-953

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Ray E. Cagle,
Petitioner

v.

Mary E. Cagle Carlson, Paul W. Mercer and Florence L. Mercer, and Gertrude Doyel,
Respondents

Writ of Certiorari to the
Arizona Court of Appeals, Division One

Respondents undersigned respectfully request that Petitioner's request for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

Respondents generally agree with Petitioner's Statement of the Case with the exception that some facts set forth by Petitioner were not undisputed facts as Petitioner would lead this Court to believe. For example at page 5 Petitioner states that he was unaware that Respondent Mercer had instituted proceedings by which the local sheriff would sell his business yard and office. Petitioner was represented during this whole by counsel. At page 9 " Respondent Mercer was himself the true party in interest, he having unduly enfluenced and coersed respondent Mary Cagle Carlson to sell her interest in the property for $20,000. These facts were not within the knowledge of Petitioner and other then for the limited purpose of the motion for summary judgment were totally disputed.

There are many other misstatement of facts but Respondents didn't find it necessary to refute them in the lower court as it was not necessary to the determination of the case and is not materal for the purposes of this matter.

REASONS FOR DENYING THE WRIT

Respondent's failure to tender payment of all sums due as a condition precedent renders the constitutional argment moot. Respondents' motion for summary judgment was granted in part because of the aforementioned failure to tender all sums due respondents.

In Young Mines Co. v. Sevringhaus, 38 Ariz. 160, 298 P 628 (1931), the Court said, **** as a condition precedent to the setting aside of the sale, defendant should tender to Plaintiff the amount of the judgment with cost and interest***. 298 P at 630.

Also in Arnold's Management Corporation et al., v. Eischen, et al., 158 Cal. App.. 3d 575 (1984 The Court said, " It is settled that an action to set aside a trustee's sale for irregularitie in sale notice or procedure should be accompani by an offer to pay the full amount of the debt for which the property was secured. *** We conclude, ****, that a junior lienor must allege tender of the senior obligation as an essential element of any causes of action ****."

The Constitutional due process argument also must fail.

Petitioner admits that respondents properly followed the statutory provisions in effectualting the sale of Petitioner's property and admits that even after knowledge of the sale, he failed to redeem the property or take any other action to protect the property for a period of four months. He failed to redeem the property and after the redemption period had run a Sheriff's deed was issued to Respondent Doyel.

These admitted facts by the Petitioner

alone are sufficient to deny his petition for Writ of Certiorari, however, in response to Petitioner's position, Respondents would point out that there is a clear distinction from the holdings in the Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306 and the line of cases associated with it and this case. The general theme is that the subjects had their day in court for what ever reason and the proceedings had affected their property rights without proper notice to them. This did not meet the equitable test of balancing the rights of the debtor and the rights of the creditor. The Neeley v. Century Finance Co. of Arizona, 606 F. Supp. 1453, (D Ariz. 1985) cited by Petitioner held that this balancing test was unbalanced as to the judgment debtor and therefore Arizona's garnishment statutes ded indeed violate the due process clause of the 14th Amendment, however this Court went on to say that Endicott (supra) was still viable and the law especially, it would appear, where as here the Petitioner was

represented by counsel before and after judgment, his counsel filed a cause of action months before the redemption period expired and eledted not to redeem his property.

CONCLUSION

Tender is the pivotal word, Petitioner had every opportunity befor and after the foreclosure of his property to tender sums due, he elected not to--- He still hasn't !

The equitable balancing as set forth in the forgoing cases require a denial of Petitioner's request for a Writ of Certiorari.

Respectfully submitted,

Gertrude Doyel
Paul W. Mercer
4568 W. El Caminito Dr.
Glendale, Arizona 85301
602-931-3393
Respondents

April 2, 1986